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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 HAMILTON SAN DIEGO
12 APARTMENTS, LP, a California
Limited Partnership,

13 Plaintiff,

14 vs.

15 RBC CAPITAL MARKETS, LLC, an
16 Illinois limited liability company; RBC
CAPITAL MARKETS
CORPORATION, an Illinois
corporation; and DOES 1 through 50,
inclusive,

17
18 Defendants.

CASE NO. 14cv01856 WQH
(BLM)
ORDER

19 HAYES, Judge:

20 The matter before the Court is Plaintiff's Motion to Remand. (ECF No. 9).

21 **I. Background**

22 On July 30, 2012, Plaintiff filed a complaint against RBC Capital Markets
23 Corporation, an Illinois Corporation and RBC Dain Rauscher, Inc., an Illinois
24 Corporation, in the San Diego Superior Court, Case No. 37-2012-00101475-CU-BC-
25 CTL. The initial action alleged: (1) breach of contract, (2) breach of the implied
26 covenant of good faith and fair dealing, (3) intentional interference with contractual
27 advantage, and (4) intentional interference with economic advantage. (ECF No. 1 at ¶4-
28 5). On September 17, 2012, the Defendants removed the initial action to the Southern
District Court of California claiming original jurisdiction under 28 U.S.C. §1332(a)(1)

1 because the amount in controversy exceeded \$75,000 and involved citizens of different
2 states. *Id.* at ¶6. On March 27, 2013, Plaintiff dismissed the initial action. *Id.* at ¶9.

3 On April 10, 2013, Plaintiff filed this action against RBC Capital Markets
4 Corporation, an Illinois Corporation and RBC Dain Rauscher, Inc., an Illinois
5 Corporation (collectively “RBC”) and WNC & Associates, Inc., WNC Holding, LLC,
6 and WNC Housing, L.P. (collectively “WNC”) in the San Diego Superior Court, Case
7 No. 37-2013-00043450-CU-BC-CTL. (ECF No. 1, Ex. 1). Plaintiff alleged the
8 following causes of action against both RBC and WNC: (1) breach of contract, (2)
9 breach of the implied covenant of good faith and fair dealing, (3) intentional
10 interference with contractual advantage, (4) intentional interference with economic
11 advantage, and (5) fraud in the inducement. *Id.*

12 On June 18, 2014, Plaintiff filed a Request for Dismissal with Prejudice as to the
13 WNC Defendants and WNC was dismissed from the action. (ECF No. 1 ¶ 20).

14 On August 6, 2014, Defendant removed this action to this Court, asserting
15 diversity of citizenship between the parties and that the amount in controversy exceeded
16 \$75,000. *Id.* at ¶ 25-35; *see* 28 U.S.C. § 1332.

17 On September 5, 2014, Plaintiff filed the Motion to Remand on the grounds that
18 (1) Defendant’s removal notice was untimely, (2) inclusion of WNC and subsequent
19 dismissal of WNC from the case is not evidence of bad faith, and (3) Defendant
20 independently waived any right to remove the case.¹ (ECF No. 9). On September 29,
21 2014, Defendant filed an opposition to the Motion to Remand asserting that removal
22 was timely because Plaintiff joined WNC in bad faith to prevent removal. (ECF No.
23 13).

24 **II. Analysis**

25 Title 28 U.S.C. § 1446(b) provides that “a notice of removal may be filed within
26 thirty days after receipt by the defendant, through service or otherwise, of a copy of an

27 ¹ The Court does not address Plaintiff’s third ground for removal that the Defendant
28 independently waived any right to remove the case because the Court grants Plaintiff’s Motion
to Remand based on the first two grounds.

1 amended pleading, motion, order or other paper from which it may first be ascertained
 2 that the case is one which is or has become removable.” 28 U.S.C. § 1446(b)(3)
 3 (emphasis added). However, “[a] case may not be removed under subsection (b)(3) on
 4 the basis of jurisdiction conferred by section 1332 more than 1 year after
 5 commencement of the action, unless the district court finds that the plaintiff has acted
 6 in bad faith in order to prevent a defendant from removing the action.” 28 U.S.C. §
 7 1446(c)(1).

8 A defendant bears the burden of establishing federal jurisdiction. *Abrego Abrego*
 9 *v. The Dow Chemical Co.*, 443 F.3d. 676, 682 (9th Cir. 2006). “Removal statutes are
 10 strictly construed against removal.” *Luther v. Countrywide Home Loan Servicing LP*,
 11 533 F.3d 1031, 1034 (9th Cir. 2008). “Federal jurisdiction must be rejected if there is
 12 any doubt as to the right of removal in the first instance.” *Gaus v. Miles, Inc.*, 980 F.2d
 13 564, 566 (9th Cir. 1992).

14 **A. Contentions of Parties**

15 Defendant contends that, “Notice of Removal is timely pursuant to 28 U.S.C. §
 16 1446(c)(1) because Hamilton acted in bad faith to prevent RBC from removing the
 17 action.” (ECF No. 1). Defendant contends that WNC, a non-diverse defendant, was
 18 named in the complaint “solely to prevent RBC from exercising its right to remove this
 19 action to federal court.” (ECF No. 13 at 6). Defendant contends that a finding of bad
 20 faith is supported by the following facts:

21 a. In its 2012 Complaint, Hamilton alleged the same claims against RBC
 22 based on the same theory it asserts in the 2013 Complaint, yet in the 2012
 Complaint Hamilton sued only RBC. (*Cf.* 2013 Compl. and 2012 Compl.)

23 b. On March 27, 2013, after losing two successive Motions to Dismiss in
 24 this Court and on the eve of RBC’s targeted date to file the Rule 11
 Motion, Hamilton voluntarily dismissed the Federal Action. (Bareket
 Decl. ¶¶ 6-17, Exs. D, H, I.)

25 c. On April 10, 2013, Hamilton filed the 2013 Complaint, naming WNC
 26 and alleging a conspiracy between RBC and WNC to commit the same
 27 alleged wrongful conduct that Hamilton had attributed solely to RBC in
 28 the 2012 Complaint. (*Cf.* 2013 Compl. and 2012 Compl.) These new
 allegations were made despite the fact that Hamilton obtained no
 discovery from RBC or any other person or entity during the Federal
 Action.

d. On November 1, 2013, WNC represented to RBC that Hamilton and WNC had a confidential agreement that would result in WNC's imminent dismissal. (Haeusler Decl. ¶¶ 2-3.) This representation was made immediately prior to a Case Management Conference attended by Hamilton's counsel, Mr. Vivoli. (*Id.*) WNC's dismissal, however, conveniently did not come until shortly after the one-year deadline from when the case was re-commenced in State Court.

e. Despite the fact that Hamilton made sweeping allegations of conspiracy between WNC and RBC, even after filing the 2013 Complaint, Hamilton sought no discovery of any kind from either WNC or RBC or from any third party. (Bareket Decl. ¶ 20.)

f. Having made no investigation into its purported claims against WNC before or after filing the 2013 Complaint, and soon after the one year limitation for removal expired, Hamilton dismissed WNC, with prejudice, for "no monetary or other compensation." (Bareket Decl. ¶ 22 Ex. K.)

Id. at 11. Defendant contends that "[t]his case was not removable on the face of the 2013 Complaint, even after WNC was dismissed Thus, RBC had 30 days from the receipt of an 'other paper' that rendered this case removable to file Notice of Removal."

Id. Defendant contends that "other paper" indicating removal was not received until July 10, 2014, when Plaintiff's counsel confirmed that "there was no monetary or other compensation paid as part of the settlement" with WNC. Defendant asserts that the notice of removal, filed August 6, 2014 was within the 30 day filing period. *Id.*

Plaintiff contends that WNC was joined in good faith based on discovery in a prior action which revealed WNC's tortious misconduct in "extricat[ing] itself from the project in a rapidly failing market..." (ECF No. 9 at 4). Plaintiff explains that WNC was voluntarily dismissed from this action, "[a]s the result of a settlement of an unrelated business dispute between Plaintiff and WNC Defendants involving their other common project, Plaintiff was required to dismiss the WNC defendants from this case in exchange for no separate monetary or other consideration from WNC." *Id.* at 4-5. Plaintiff contends that the 30 day clock to timely file for removal began on June 18, 2014 when WNC was dismissed, and that the August 6, 2014 removal was not timely. *Id.* at 5.

B. Ruling of Court

1 The parties agree that removal in this case is presumptively untimely because the
 2 action was removed on August 6, 2014, which is more than one year after it commenced
 3 on April 10, 2013. (ECF No. 1; ECF No. 9). “A case may not be removed ... more than
 4 one year after the commencement of the action, unless the district court finds that the
 5 plaintiff has acted in bad faith in order to prevent a defendant from removing the
 6 action.” 28 U.S.C. § 1446(c)(1). “The bad faith requirement sets a high threshold...”
 7 *Primus Automotive Financial Services, Inc. v Batarse*, 115 F.3d 644, 649 (9th Cir.
 8 1997). The Court of Appeals for the Ninth Circuit has explained in a different context
 9 that “[a] finding of bad faith is warranted where an attorney ‘knowingly or recklessly
 10 raises a frivolous argument, or argues a meritorious claim for the purpose of harassing
 11 an opponent.’” *Id.* (citing *In re Keegan Management Co., Sec. Litig.*, 78 F.3d 431, 436
 12 (9th Cir. 1996)). The Ninth Circuit has further stated that “[a] party demonstrates bad
 13 faith by ‘delaying or disrupting the litigation or hampering enforcement of a court
 14 order.’” *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 689 n. 14 (1978)).

15 In this case, Plaintiff’s Counsel submitted a sworn declaration which states in
 16 part:

17 I represented Plaintiff and another entity in a state court case captioned
 18 *Hamilton San Diego Apartments, LP, et al. v. Professional Property*
 19 *Management, LLC, et al.*, San Diego Superior Court Case No.
 20 37-2009-00103507-CU-BC-CTL (“the PPM Action”). The PPM Action
 21 was filed against the property management company, Professional
 22 Property Management, LLC (“PPM”) that managed the real property at
 23 issue in this case, and another property located in Oakland, California.
 24 Both projects involved WNC & ASSOCIATES, INC. (“WNC”), which
 25 served as Plaintiff’s capital partner in the projects pursuant to limited
 26 partnership agreements. Within the course of the PPM Action, PPM issued
 27 deposition subpoenas duces tecum to WNC and the RBC Defendants
 28 herein (collectively “RBC”). As a result of those subpoenas, Defendants
 herein produced their files prior to the deposition of their designated
 witness. In reviewing those files, I concluded that Defendants and WNC
 had conspired to elevate their own interests above Plaintiff’s interests, in
 violation of written agreements between both entities and Plaintiff. As a
 result, Plaintiff ultimately filed the Prior Action[.] As to WNC it appeared
 WNC tried to get out of the project because of a rapidly falling market
 and, as to RBC, it appeared RBC conspired to try and foreclose upon
 Plaintiff’s asset and the equity RBC realized it could gain through that
 foreclosure, in addition to acquiring valuable tax benefits due to the
 project’s low income housing status.

...

1 Although I believed Plaintiff had valid claims against WNC, I did not
 2 name WNC as a party to [Suit One] for reasons having to do with
 Plaintiff's ongoing business relationship with WNC in the other project
 which the parties were then involved.

3 (ECF No. 9-2 ¶ 2-3). The Court finds that Plaintiff states a plausible explanation for
 4 the joinder of WNC in the instant action, but failing to join WNC in the initial action.

5 The Declaration submitted by Plaintiff's counsel further states that:

6 Before the mediation, I did not initiate discovery against WNC because the
 7 documents obtained in the [prior action against WNC], in my view,
 8 sufficiently solidified Plaintiff's claims against WNC such that I did not
 perceive the need to initiate formal discovery at that time. There was no
 9 other reason for my election not to waste my client's resources conducting
 additional discovery when I already had sufficient evidence of WNC's
 10 motives in getting out of the project at issue in this case, which I believed
 WNC manufactured grounds to do.

11 ...

12 Prior to May 30, 2014, I had not taken discovery of Defendants for largely
 the same reason I had not initiated discovery against WNC. Indeed, the
 13 internal emails within RBC were even more damning, in my view, than
 those involving WNC.

14 (ECF No. 9-2 ¶ 5-6).

15 The Court finds that Plaintiff did not consistently fail to take steps to prosecute
 16 the claims against the RBC or WNC. Defendant contends only that Plaintiff did not
 17 seek discovery from RBC or WNC or make an investigation into its claims against
 18 WNC. The sworn Declaration states a consistent and plausible explanation for
 19 requesting no discovery from WNC or RBC and making no investigation into its claims
 20 against WNC. *See Lawson v. Parker Hannifin Corp.*, No. 13-cv-923-O, 2014 WL
 21 1158880 (N.D. Tex. Mar. 20, 2014) (finding bad faith where plaintiff "consistently
 22 failed to take steps to prosecute her claims against Hanlon, including failing to serve
 23 him with discovery requests or noticing his deposition, and failing to seek a default
 24 judgment when Hanlon failed to timely answer the petition.").

25 The Declaration submitted by Plaintiff's Counsel further states that:

26 This case was mediated on or about April 23, 2014, a date that was
 27 immediately after I had concluded closing arguments in a three-week jury
 trial in Yolo County in the case captioned *City of Roseville v. AECOM*
 28 *Technology Corporation*, Case No. CV11-1282. And, the City of Roseville
 trial was my third this year; such that I was nearly constantly engaged in
 trial up through that date. Moreover, following that mediation and the City

1 of Roseville trial, from May 9, 2014, through June 18, 2014, I was
 2 engaged in a jury trial in the case captioned Pacifica Companies, LLC et
 al. v. Shailesh (“Sunny”) Pate et al., San Diego Superior Court Case No.
 37-2012-00092404-CU-NPCTL.

3 ...

4 At the April 23, 2014 mediation, Plaintiff reached a settlement of WNC’s
 involvement in this case.

5 ...

6 It is my understanding that settlement was more or less dictated by a
 7 recent settlement of another action involving the parties’ other project, in
 which I did not represent Plaintiff and of which I was not previously
 8 aware.

9 (ECF No. 9-2 ¶ 4-5).

10 Plaintiff has provided consistent plausible reasoning for the timing of the non-
 11 diverse Defendant’s dismissal. Moreover, WNC was dismissed on June 18, 2014, more
 12 than two months after the expiration of the one-year limitations period on April 10,
 13 2014. The Court finds that WNC’s dismissal more than two months after the one-year
 14 limitation for removal expired is not indicative of bad faith. *Compare Lawson*, 2014
 15 WL 1158880 at *1 (finding that “nonsuiting Hanlon shortly after the one-year period
 16 for removal coupled with the belated filing of the notice of nonsuit, and execution of
 17 the Release by Lawson nine days prior to the date she allegedly settled with Hanlon, ...
 18 support the Court’s finding of bad faith forum manipulation.”), *and Forth v. Diversey*
 19 *Corporation*, No. 13-cv-808-A, 2013 WL 6096528, *1 (W.D.N.Y. Nov. 20, 2013)
 20 (finding that Plaintiff’s explanations and actions were both “inconsistent and
 21 implausible” leading the court to determine that Defendants had demonstrated by clear
 22 and convincing evidence that Plaintiffs acted in bad faith to prevent Defendants from
 23 removing the action.), *with NKD Diversified Enterprises, Inc. v. First Mercury Ins. Co.*,
 24 No. 14-cv-00183-AWI-SAB, 2014 WL 1671659, *1 (E.D. Cal. Apr. 28, 2014) (finding
 25 no evidence of bad faith when the non-diverse party was dismissed less than three
 26 months after the expiration of the one-year removal period).

27 The Court finds that Defendant has not met the high threshold required to
 28 establish bad faith on the part of the Plaintiff. *See Primus*, 115 F.3d at 649. The facts

alleged by Defendant do not show that Plaintiff or Plaintiff's attorney knowingly or recklessly raised a frivolous argument, or delayed or disrupted the litigation in order to prevent removal. *See Id.* at 689. Because Defendant has failed to demonstrate bad faith, the exception to the one-year removal period does not apply and Defendant's removal is untimely.

B. Attorney Fees

Plaintiff contends that, "given the untimely and improper nature of the Defendants' efforts to remove this case, Plaintiff should be awarded its attorney's fees and costs incurred related to the same" pursuant to 28 U.S.C. § 1447(c). (ECF 14 at 10). The relevant part of 28 U.S.C. § 1447(c) states: "An order remanding the case may require the payment of just costs and any actual expenses, including attorney fees, incurred as a result of removal." 28 U.S.C. § 1447(c). "Whether to award attorney fees is left to the discretion of the district court." *NKD*, 2014 WL 1671659 at *8 (citing *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005)). "Determining whether attorney fees should be awarded turns on the reasonableness of the removal." *Id.* (citing *Lussier v. Dollar Tree Stores, Inc.*, 518 F.3d 1062, 1165 (9th Cir. 2008)). "[A]bsent unusual circumstances, attorney's fees should not be awarded when the removing party has an objectively reasonable basis for removal." *Martin v. Franklin Capital Corp.*, 546 U.S. at 136.

Although Defendant has not met its burden of establishing bad faith, the Court finds that RBC had an objectively reasonable basis for seeking removal. Plaintiff's request for attorney fees is denied.

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III. Conclusion

IT IS HEREBY ORDERED that the Motion to Remand is **GRANTED** and

1 Plaintiff's request for attorney fees is **DENIED**. (ECF No. 9). This action shall be
2 **REMANDED** to the Superior Court of California, County of San Diego, where it was
3 originally filed and assigned Case No. 37-2013-00043450-CU-BC-CTL.

4 DATED: December 11, 2014

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6 **WILLIAM Q. HAYES**
7 United States District Judge
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